

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Complaint
by Rochester Express
Airport Shuttle, Inc.

v.

Rochester Direct Corporation

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on April 9, 1997, in Rochester.

Appearing for the Complainant, Rochester Express Airport Shuttle, Inc., was Daniel J. Moulton, Moulton Law Office, 976 S.W. 14th Avenue, Rochester, Minnesota 55902.

Appearing on behalf of Respondent, Rochester Direct Corporation, was Dawn M. Parsons, Attorney at Law, 5200 West 73rd Street, Edina, Minnesota 55439.

The hearing ended at the end of the day on April 9, and the record closed on April 22 upon receipt of final memoranda.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bradley J. Larsen, Mn/DOT Railroad and Motor Carrier Proceedings, 395 John Ireland Boulevard, Mail Stop 440, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

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STATEMENT OF ISSUE

Has Rochester Direct violated Minnesota statutes or rules in connection with its advertising of service to the Mall of America or in connection with its sale of tickets at prices different from its tariff?

Based upon all the files and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Parties

1. Rochester Express Airport Shuttle, Inc. has authority to carry passengers between Rochester and the Mall of America. The exact extent of its authority is not outlined in the record of this proceeding. Its president is Truman Moulton.

2. Rochester Direct Corporation holds regular route authority granted by the Minnesota Transportation Regulation Board under Docket No. RRCC 777 to transport passengers, baggage, U.S. Mail and express over certain specified routes, including:

between Minneapolis/St. Paul International Airport, on the one hand, and, on the other, points in the City of Rochester, serving no intermediate points, and restricted to "maxi-van" vehicles not to exceed 12 persons on any one trip.

3. This authority was further extended, as it pertains to U.S. Mail, express, parcels and packages (but not passengers) to allow for transportation statewide, without any restrictions as to weight or vehicles used.

4. In addition to the regular route authority granted under RRCC 777, Rochester Direct also holds courier service carrier permit authority pursuant to CSC 63334, which is statewide. It does not authorize the transport of passengers.

5. In addition to the intrastate authority noted above, Rochester Direct also holds both regular route and charter interstate authority from the I.C.C. In Docket No. 292036, Sub. O C, Rochester Direct was granted authority to transport passengers as a common carrier over regular routes that include Decorah, Iowa; Cresco, Iowa; and Hudson, Wisconsin. Ex. 2, Attach. B and Exs. 18 and 19. Pursuant to this authority (which was granted in November and December 1995), by the date of the hearing Rochester Direct had only hauled one load of passengers from Cresco, Iowa to the Minneapolis-St. Paul Airport. Rochester Direct has never activated its regular route interstate authority to serve the Mall of America.

6. On August 10, 1995, Rochester Express filed a complaint against Rochester Direct with the Minnesota Transportation Regulation Board. Among the items raised in that complaint was an allegation that Rochester Direct was advertising service between Rochester and the Mall of America without authority to service the Mall of America. Following a hearing in December of 1995 and January of 1996, Deputy Commissioner of Transportation Darrell E. Durgin issued his Order, dated September 20, 1996, directing Rochester Direct to cease and desist from all violations of Minn. Stat. ch. 221, and suspending Respondent's intrastate regular route common carrier authority for a period of 21 days. That matter is on appeal to the Minnesota

Court of Appeals. The sole purpose of this Finding is to indicate that Rochester Direct was on notice with regard to restrictions concerning advertising and serving the Mall of America.

Yellow Pages and Telephone Book Cover Advertising

7. In 1995, Rochester Direct placed two advertisements regarding services to the Mall of America in the 1996/1997 US WEST telephone directory. The final date for yellow page changes was January 17, 1996. See, Letter dated April 3, 1997 to Kurt Marquardt, Rochester Direct, from Mary Hafner, US WEST DEX.

8. The first advertisement at issue in the US WEST telephone book (Ex. 16) is located near the yellow page categories of "Airlines-Ticket Agencies" and "Airport Transportation". This first ad reads as follows:

Rochester Direct to Minneapolis Airport & Mall of America, eight departures daily, van service pick-up at most Rochester hotels, 24-hour reservation hotline - 280-9270. 1500 NE 1 Av., Suite 210, Rochester.

9. The next advertisement at issue in the US WEST directory has identical language, and is near the category "Taxicabs & Transportation Service". The most recent US WEST book (1997/1998) contains advertisements which do not mention the Mall of America.

10. During 1995, Rochester Direct also placed an ad in the Telecom USA telephone book, Ex. 15. This ad, under the category "Bus Lines" reads as follows:

Van service to Minneapolis Airport, Mall of America, leaves every two hours . . .

11. The last day for persons to make changes in the wording of an advertisement in the Telecom USA telephone book was November 3, 1995. See, Fax Transmittal to Kurt [Marquardt] from Dyane Musgrove dated October 30, 1996. The most recent Telecom USA book contains an ad which does not mention the Mall of America.

12. Rochester Direct argues, among other things, that these advertisements fail to distinguish between passengers and packages, and therefore cannot be deemed to suggest that passengers could be taken to the Mall of America. A reasonable person would not reach that conclusion. A reasonable person would conclude that the advertisements are for passengers.

13. On or about March 6, 1996, the general manager of Rochester Direct was contacted by Americom Corporation, relating to advertising on a plastic book cover which would fit over the US WEST telephone book. In exchange for services, Rochester Direct would be entitled to place a free ad on that cover. The wording of the advertisement, which was provided by Rochester Direct, is the same as in Ex. 16, the US WEST Direct telephone book, including the reference to the Mall of America. Ex. 17. This was distributed in the Rochester area in October of 1996.

14. Rochester Direct has not actually provided passenger service from Rochester to the Mall of America. When a "test call" was made to Rochester Direct

inquiring about passenger service to the Mall of America, the caller was informed that Rochester Direct did not take passengers directly to the Mall of America, but would take them to the airport.

KWEB Radio Auction

15. Radio station KWEB is an AM sports-oriented station in Rochester. On Saturday mornings, it conducts what is described as "the KWEB Radio Auction". This is a program whereby merchandise is offered for sale to the public on a first-come, first-served basis. Merchandise is generally sold at a discount from retail value.

16. On March 8, 1996, Kurt Marquardt entered into an agreement with KWEB whereby Marquardt supplied KWEB with 100 one-way Rochester Direct bus tickets. These bus tickets have a retail value of \$19.00 each, unless bought by a group (which is not at issue here). In exchange for the tickets, KWEB provides Rochester Direct with the full retail value (\$19.00 per ticket) in advertisements at other times of the week. KWEB began selling the one-way tickets on March 23, 1996, and offered them virtually continuously until they ran out. On October 18, Marquardt and KWEB entered into another contract for 100 tickets. The tickets were offered and sold for \$8.00 each. By the date of the hearing, roughly 300 tickets had been sold through the auction. This promotion has had a substantial impact on the business of Rochester Express.

17. The script which the announcers used made no mention of the Mall of America. Ex. 14. A tape recording of one of the Saturday auctions, however, included the following (edited in the interest of saving space) language spoken by the "auctioneer":

This is from Rochester Direct. It is a one-way trip to and from the Minneapolis Airport from Rochester. Normally, these are a \$19.00 value, we are selling them for \$8.00. . . . Means you buy two of them, you've got round-trip transportation and you still haven't paid normal price for the first one. . . . Plus, if you want to go shop in the Mall of America, this will get you to the airport, you pay a couple extra bucks, they will shuttle you back over to the Mall of America, do your shopping, don't worry about your driving, get back after a long day of shopping Ex. 11A.

This reference to the Mall of America was not intended by Rochester Direct, and was not suggested to the announcers by Rochester Direct. Instead, it was merely an attempt by the announcers to make the tickets seem more attractive.

Procedural History

18. On or about October 10, 1996, Rochester Express filed a formal Complaint against Rochester Direct. The Complaint alleged violations of Minn. Stat. § 221.021, consisting of advertisements in the US WEST and Telecom telephone books, as well as an advertisement on a telephone book cover, indicating service to the Mall of America. Additionally, the Complaint alleged a violation of Minn. Stat. § 221.171, involving tickets being sold on the KWEB auction at a rate lower than the filed tariff.

19. On or about October 30, 1996, Rochester Direct filed an Answer, denying it was unlawfully holding out or advertising services without a certificate or permit, and alleging that it had both a RRCC certificate and a courier permit in full force and effect allowing it to serve the Mall of America. Rochester Direct also responded to the tariff issue, alleging it received full consideration for each ticket by way of an equal dollar amount of advertising.

20. On or about October 29, Rochester Express filed its first Amended Complaint, which added an allegation of advertising Mall of America passenger service via the KWEB auction. Rochester Direct filed a denial.

21. On or about March 31, 1997, Rochester Express amended its formal Complaint for the second time, alleging that Rochester Direct's contractual relationship with KWEB violated Minn. Stat. § 221.171 because there was no written guarantee that a group quantity would be purchased.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Transportation has jurisdiction over the subject matter of this hearing.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled, and, therefore, the matter is properly before the Administrative Law Judge.

3. Rochester Direct violated Minn. Stat. § 221.021 by advertising that it provided passenger service between Rochester and the Mall of America in the US WEST and Telecom telephone books, as well as on the telephone book cover.

4. Complainant failed to meet its burden of proof to show that Rochester Direct violated Minn. Stat. §§ 221.041 or 221.171 in connection with the sale of its tickets in the KWEB auction process.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner suspend the operating authority of Rochester Direct for thirty (30) days.

Dated this _____ day of May 1997.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Taped (three tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Board is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Stripped to its essentials, this matter is relatively simple and straightforward. Through prior litigation, Rochester Direct was well aware that it did not have intrastate authority to transport passengers from Rochester to the Mall of America. Rochester Direct had ample opportunity to change its advertisements in both telephone books and the telephone book cover. It did not make any effort to delete the references to the Mall of America. This was a knowing, intentional act designed to generate additional business for its airport service in a "bait and switch" manner -- callers who saw the ads and wanted to go to the Mall of America would be advised that they could not be taken directly to the Mall, but that they could get there by taking Rochester Direct's bus to the airport and then taking other transportation to the Mall.

The KWEB auction, whereby tickets were sold to the public at less than the tariffed rate had the effect of moving traffic from Rochester Express to Rochester Direct by virtue of the low ticket price, as well as by virtue of whatever business was generated by the advertisements by KWEB. However, it is not at all clear whether it is a violation of the statute or not, because Rochester Direct did receive the tariffed value in advertising.

A definitive resolution of this issue would require the development of a legal analysis that would far exceed what has been provided by the parties in this case. Therefore, the Administrative Law Judge concluded that Complainant failed to meet its burden of proof to show a violation of the statute.

The Administrative Law Judge has recommended a 30-day suspension primarily because the prior suspension, which was for 21 days, did not seem to change Rochester Direct's behavior. The Commissioner may wish to consider some more severe penalty if he believes it is necessary to assure compliance with the law in the future.

AWK